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In The

Supreme Court of the United States

October Term, 1992

MUSICK, PEELER & GARRETT, LEONARD CASTRO, ROBERT SCHUCHARD, J.H. COHN & CO., ED BACANI and ROBERT TORKAR,

Petitioners,

vs.

EMPLOYERS INSURANCE OF WAUSAU and FEDERAL INSURANCE COMPANY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS IN SUPPORT OF PETITIONERS

I. INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

The National Association of Securities and Commercial Law Attorneys ("NASCAT") is an association of law firms and attorneys located throughout the United States. NASCAT and its members advocate the enactment and enforcement of effective laws to protect investors from deceptive and manipulative practices and to ensure that the United States securities markets operate freely and efficiently. NASCAT's members frequently represent

plaintiffs in a variety of individual, class action and derivative cases prosecuted under the federal securities laws. NASCAT and its members have an interest in the effective private enforcement of the federal securities laws and in the development of case law that effectively deters wrongdoers from perpetrating securities fraud violations upon investors in this country. Accordingly, NASCAT is *strongly opposed* to the judicial creation of an implied cause of action for contribution to benefit those who commit securities fraud prohibited by Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission ("SEC"), 17 C.F.R. § 240.10b-5. NASCAT previously filed an *amicus curiae* brief in this case urging the Court to grant a writ of certiorari. All parties have consented to filing of this *amicus curiae* brief on the merits.

The Ninth Circuit's holding in this case that there is a right to contribution under Section 10(b) cannot be reconciled with this Court's precedents and, therefore, must be reversed. The Ninth Circuit's decision[1] conflicts with this Court's precedents establishing when and how federal courts may create an implied cause of action for contribution to benefit *wrongdoers* liable under a federal statute that does not expressly provide for contribution.[2] *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981), and *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), hold that a right to contribution may not be created by implication absent legislative intention to create such a cause of action. As detailed herein, no

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[1] The Ninth Circuit's decision is reported as *Employers Ins. of Wausau v. Musick, Peeler & Garrett*, 954 F.2d 575 (9th Cir.), *cert. granted*, No. 92-34, 1992 U.S. LEXIS 5564 (1992).

[2] The court below acknowledged that "[n]o explicit right to contribution is provided for" in Section 10(b) or Rule 10b-5. *Employers Ins.*, 954 F.2d at 577. Nevertheless, the Ninth Circuit stated, "[w]e have recognized . . . that these provisions imply a right of contribution." *Id.* (citations omitted).

such intention can be found under Section 10(b) or Rule 10b-5.

The Ninth Circuit's decision in this case also conflicts with *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977), which governs when and how federal courts will imply causes of action under Section 10(b) of the Exchange Act. Although an implied cause of action under Section 10(b) has long been recognized by this Court[3] and has been expressly approved by Congress,[4] the scope of such actions is strictly limited to providing relief to victims of materially misleading statements or omissions and market manipulation. This Court's decision in *Santa Fe Industries* holds that additional causes of action, such as one for contribution among violators of the provision, may not be created under Section 10(b) to serve what is, at best, a subsidiary purpose of Congress when it enacted the statute to prohibit fraud.

In addition, creation of a right to contribution under Section 10(b) is contrary to sound considerations of public policy and would interfere with effective enforcement of the law and is, therefore, inconsistent with congressional intent in enacting the statute. By spreading the cost of a judgment an implied cause of action for contribution seriously undermines the intended deterrent effect of the anti-fraud provisions of the federal securities laws. In addition, a judicially created cause of action for contribution impedes early consensual resolution of securities fraud actions, and greatly complicates litigation of such claims. Judicial creation of a cause of action to benefit those who commit securities fraud is unfair to their victims.

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[3] *See Basic Inc. v. Levinson*, 485 U.S. 224, 230-31 (1988); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196-97 (1976).

[4] In the recently enacted Section 27A of the Exchange Act, for example, Congress expressly provided for reinstatement of implied private civil actions under Section 10(b) that might otherwise be barred by this Court's holding in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ___ U.S. ___, 111 S. Ct. 2773 (1991). *See* 15 U.S.C. § 78aa-1.

For these reasons, NASCAT respectfully submits that the Ninth Circuit's decision in this case should be reversed and this Court should hold that a right to contribution cannot be implied under Section 10(b) or Rule 10b-5.

II. ARGUMENT

A. The Federal Courts May Not Imply A Private Right Of Action For Contribution Under Section 10(b) Of The Exchange Act Or SEC Rule 10b-5 Because Congress Did Not Intend To Provide For One

In *Northwest Airlines* and *Texas Industries*, this Court held that the federal courts may not imply a right of contribution in federal statutes if Congress did not intend to provide for one. Although this Court did not consider in those cases whether an implied cause of action for contribution could be created under Section 10(b) of the Exchange Act or Rule 10b-5 in order to benefit those who commit fraud, the principles set forth in *Northwest Airlines* and *Texas Industries* properly control the question presented here. *See, e.g., Chutich v. Touche Ross & Co.*, 960 F.2d 721, 723 (8th Cir. 1992).

Whether the underlying private right of action is express or implied, the federal courts have applied the *Northwest Airlines* and *Texas Industries* analytical framework in determining whether to create a right of action for contribution.[5] In *Chutich*, where the Eighth Circuit

[5] *See Mortgages, Inc. v. United States District Court*, 934 F.2d 209, 213 (9th Cir. 1991) (refusing to create right of contribution among participants in scheme to defraud federal government under False Claims Act); *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 27-28 (1st Cir. 1990) (declining to create a right of contribution under the Commodity Exchange Act); *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 92 n.6 (1st Cir. 1990) (refusing to use common law to create a right of contribution against settlor of a CERCLA suit); *Ridenour v. Andrews Federal Credit Union*, 897 F.2d 715, 722 (4th Cir. 1990) (refusing to create a common law right to sue under the Federal Credit Union Act); *Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186, 1191 (7th Cir. 1989) (no right of contribution under Tax Code § 6672(a)); *Getty Petroleum Corp. v. Island Transp. Corp.*, 862 F.2d 10, 16 (2d Cir. 1988) (refusing to create a common law right of contribution under the Lanham Act's trademark infringement provisions), *cert. denied*, 490 U.S. 1006 (1989); *Green v. United States Dept. of Labor*, 775 F.2d 964, 971 (8th Cir. 1985) (finding no implied right to contribution or indemnity under § 8132 of Federal Employees' Compensation Act); *Friedman v. Hartmann*, 787 F. Supp. 411, 415-18 (S.D.N.Y. 1992) (refusing to find right of contribution under RICO); *Biben v. Card*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,512, at 92,331 n.2 (W.D. Mo. 1991) (no contribution under Section 10(b)); *Nelsen v. Craig-Hallum, Inc.*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,500, at 93,192-93 (D. Minn. 1989) (no contribution under Section 10(b)); *In re Professional Financial Management, Ltd.*, 683 F. Supp. 1283, 1285-87 (D. Minn. 1988) (no contribution under Section 10(b)); *Robin v. Doctors Officenters Corp.*, 730 F. Supp. 122, 124 (N.D. Ill. 1989) (no contribution under Section 10(b)).

held that the federal courts have no power to create a right of action for contribution among violators of Section 10(b) and Rule 10b-5, the court stated that "the analytical framework in *Texas Industries* applies to this case," noting that "the failure to follow *Texas Industries* in cases in which the underlying private right of action is implied rather than express would create a double standard for implying rights of action for contribution." 960 F.2d at 723. Circuit courts have also applied the *Northwest Airlines/Texas Industries* analytic framework in determining whether a right to indemnification exists under the securities laws.[6] No other standard may be followed here and,

[6] *See, e.g., King v. Gibbs*, 876 F.2d 1275, 1280-82 (7th Cir. 1989) (declining to create right to indemnification under Section 10(b) of the Exchange Act); *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1106 (4th Cir. 1989) (refusing to create right to either contribution or indemnification under Section 12(2) of

as noted above (*see supra* note 2), the Ninth Circuit did not offer one. *See Employers Ins.*, 954 F.2d at 577.

An analysis of this Court's decisions in *Northwest Airlines* and *Texas Industries* precludes the implication of contribution rights under Section 10(b) and Rule 10b-5 and mandates reversal of the Ninth Circuit's decision in this case. In *Northwest Airlines*, plaintiff Northwest Airlines sought contribution from labor unions for a judgment rendered against the airline in a class action brought under the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 and complaining of discriminatory pay practices against female flight attendants.[7] The Court held that the "ultimate question" in such cases is "whether Congress intended to create the private remedy for . . . contribution." 451 U.S. at 91. Justice Stevens observed that the relevant factors include "the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing State remedies." *Id.* (citations omitted). The first factor was easily disposed of because neither the Equal Pay Act nor Title VII "expressly

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the Securities Act of 1933, (the "Securities Act") 15 U.S.C. § 77*l*(2)).

[7] During the period in question, the airline paid higher wages to its male cabin attendants (who were classified as pursers) than to its female cabin attendants (who were classified as stewardesses), both of whom were represented by the Transit Workers Union and, later, by the Airline Pilots Association, International. The basis of the airline's contribution claim against the labor unions was that the employees' wages were fixed by collective bargaining agreements negotiated and executed in response to union demands. 451 U.S. at 80-82.

creates a right to contribution in favor of employers." *Id.* at 93. Similarly, as the Eighth Circuit more recently concluded in *Chutich*, 960 F.2d at 722-23, neither Section 10(b) nor Rule 10b-5 expressly creates a right to contribution.[8]

In *Northwest Airlines*, Justice Stevens observed that a cause of action for contribution might be implied "if, among other things, the language of the statutes indicates that they were enacted for the special benefit of a class of which the [party seeking contribution] is a member." 451 U.S. at 91-92 (citation omitted). This Court held that no right to contribution could be implied from the statutory language, however, because "it cannot possibly be said

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[8] In this case, the Ninth Circuit agreed, stating that no "explicit right to contribution is provided for" in Section 10(b) or Rule 10b-5. *Employers Ins.*, 954 F.2d at 577. In *Northwest Airlines*, Justice Stevens noted that Congress "expressly provided" for contribution among joint wrongdoers *only* in Section 11(f) of the Securities Act, 15 U.S.C. § 77k(f), and in Sections 9(e) and 18(b) of the Exchange Act, 15 U.S.C. §§ 78i(e), 78r(b), stating that "when Congress wanted to provide a right to contribution, it did so expressly." 451 U.S. at 92 n.24. As one district court has read footnote 24 of the *Northwest Airlines* opinion, Congress' failure to provide an explicit right to contribution under Section 12(2) of the Securities Act, 15 U.S.C. § 77*l*(2), and Section 10(b) of the Exchange Act "suggests that it did not intend to provide for contribution under those sections." *Professional Financial Management*, 683 F. Supp. at 1286. The *Northwest Airlines* Court also observed that the Second and Seventh Circuits had previously recognized an implied right to contribution under other provisions of the federal securities laws where the underlying liability resulted from an implied private right of action, but declined to address "the merit of this reasoning." 451 U.S. at 92 n.24. As the Eighth Circuit has subsequently stated, these early circuit court decisions either predate this Court's controlling decisions in *Northwest Airlines* and *Texas Industries*, simply follow earlier precedent without considering this Court's decisions, or have been subsequently overruled in their respective Circuits. *See Chutich*, 960 F.2d at 723; *see also King v. Gibbs*, 876 F.2d at 1280 n.8; *Robin*, 730 F. Supp. at 124.

that employers are members of the class for whose especial benefit either the Equal Pay Act or Title VII was enacted," *id.* at 92 (citation omitted):

> To the contrary, both statutes are expressly directed against employers; Congress intended in these statutes to regulate their conduct for the benefit of employees. In light of this fact, [an employer held liable under these statutes] "can scarcely lay claim to the status of 'beneficiary' whom Congress considered in need of protection."

Id. (footnote omitted) (quoting *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 37 (1977)). Similarly, as detailed below, it cannot be said that Section 10(b) or Rule 10b-5 were enacted or promulgated for the benefit of persons who violate the securities laws.

Finally, the *Northwest Airlines* Court held that no principles of federal common law permit a court to fashion a cause of action for contribution where Congress did not intend to provide one. *Id.* at 95-98. Similarly, the federal courts do not have authority under Section 10(b) or Rule 10b-5 to fashion a federal common law rule of contribution, because contribution does not implicate uniquely federal interests of the kind that oblige courts to fashion federal common law and because the Exchange Act contains no provision giving federal courts broad power to develop a federal common law to benefit those who commit securities fraud. *See Chutich*, 960 F.2d at 724.

In *Northwest Airlines*, this Court left open the question whether contribution could be implied under the antitrust laws. 451 U.S. at 98 n.42. Five weeks later, however, in *Texas Industries*, this Court applied the *Northwest Airlines* analytical framework and held that no implied cause of action for contribution may be created under either the Sherman or Clayton Acts because, *inter alia*, those statutes "were not adopted for the benefit of the participants in a conspiracy to restrain trade." 451 U.S. at 639.

In *Texas Industries*, a construction company which had purchased concrete from a manufacturer and seller of ready-mixed concrete charged that the manufacturer and certain unnamed concrete firms had conspired to raise prices in violation of Section 1 of the Sherman Act. Through discovery, the defendant manufacturer learned of the certain other concrete producers that had participated in the alleged price-fixing scheme and filed a third-party complaint seeking contribution from them should it be held liable in the action filed by the construction company. In its decision, this Court noted that the federal antitrust laws do not expressly establish a right of action for contribution and rejected the view that such a right exists by implication under the antitrust laws. 451 U.S. at 639-40.[9] Chief Justice Burger emphasized the deterrent purpose of the Sherman and Clayton Acts:

> [I]t is . . . clear that the Sherman Act and the provision for treble-damage actions under the Clayton Act were not adopted for the benefit of the participants in a conspiracy to restrain trade. On the contrary, [the concrete manufacturer] "is a member of the class whose activities Congress intended to regulate for the protection and benefit *of an entirely distinct class.*" The very idea of

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[9] Writing for the Court, Chief Justice Burger noted that the parties and various amici had discussed how a right to contribution should be structured and, in particular, "how to treat problems that may arise with the allocation of damages among the wrongdoers and the effect of settlements." *Id.* at 637. Without reaching a decision, this Court acknowledged that "[i]n addition to the question of allocation, a right to contribution may have a serious impact on the incentive of defendants to settle," *id.*, and observed that "[r]egardless of the particular rule adopted for allocating damages or enforcing settlements, the complexity of the issues involved may result in additional trial and pretrial proceedings, thus adding new complications to what already is complex litigation." *Id.* at 638. As noted below, similar public policy considerations are raised by the question presented in this case. *See infra* Part II.C.2.

> treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers.

Id. at 639 (emphasis in original) (quoting *Piper*, 430 U.S. at 37). Once again, as in *Northwest Airlines*, this Court held that nothing in principles of federal common law could justify creation of an implied cause of action for contribution. *Id.* at 640-46.

Taken together, this Court's decisions in *Northwest Airlines* and *Texas Industries* compel the conclusion that federal courts should not create a right of action for contribution among violators of Section 10(b) or Rule 10b-5. In its well-reasoned decision in *Chutich*, 960 F.2d at 722-24, the Eighth Circuit concluded that there is no basis for implying a right of action for contribution in the first way provided in *Texas Industries* – through congressional intent. This Court's precedent prohibits implication of a right to contribution under Section 10(b) or Rule 10b-5 if they were not designed for the "especial benefit" of those who commit securities fraud.

As detailed herein, this statute and rule were no more designed to protect those who defraud investors than were the Equal Pay Act and Title VII designed to protect employers, *see Northwest Airlines*, 451 U.S. at 92, or the antitrust laws were designed to protect those who conspire in restraint of trade, *see Texas Industries*, 451 U.S. at 639. Instead, Section 10(b), as a part of the Exchange Act, was "designed to protect investors against manipulation of stock prices," *Basic*, 485 U.S. at 230, by "implementing a 'philosophy of full disclosure.' " *Santa Fe Industries*, 430 U.S. at 477-78 (citation omitted). By its own terms, Section 10(b) authorizes promulgation of rules and regulations that are "in the public interest *or for the protection of investors*." 15 U.S.C. § 78j(b) (emphasis added). Thus, Rule 10b-5 fulfills the same public purposes, and the statute and rule are *not* for the protection of those who commit securities fraud. Under this Court's decisions in *Northwest Airlines* and *Texas Industries*, no cause

of action for contribution may be judicially implied under Section 10(b) or Rule 10b-5.[10]

B. This Court's Decisions Governing The Scope Of Actions That May Be Implied Under Section 10(b) Prohibit The Creation Of A Right To Contribution To Benefit Wrongdoers As A Matter Of Federal Common Law

As the Eighth Circuit stated in *Chutich*, federal courts "have authority to formulate federal common law in two narrow situations: when 'a federal rule of decision is "necessary to protect uniquely federal interests," and [when] Congress has given the courts the power to develop substantive law.' " 960 F.2d at 724 (quoting *Texas Industries*, 451 U.S. at 640). In *Texas Industries*, this Court held that "contribution does not implicate 'uniquely federal interests' of the kind that oblige courts to formulate federal common law." 451 U.S. at 642; *see also Chutich*, 960 F.2d at 724. Nevertheless, a few district court decisions hold that because the private cause of action under Section 10(b) and Rule 10b-5 arises by judicial implication, courts are free to create an implied cause of action for contribution without regard to legislative intent or the usual limitations on such judicial lawmaking.[11]

These decisions correctly observe that the private cause of action under Section 10(b) and Rule 10b-5 arises by judicial implication and has been shaped through a process of common law adjudication. As this Court

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[10] *See Chutich*, 960 F.2d at 724; *Biben*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,512, at 92,331 n.2; *Nelsen*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,500, at 93,192-93; *Professional Financial Management*, 683 F. Supp. at 1285-87; *Robin*, 730 F. Supp. at 124.

[11] *See, e.g., Baker v. BP America, Inc.*, 749 F. Supp. 840, 842-44 (N.D. Ohio 1990); *In re Olympia Brewing Co. Securities Litigation*, 674 F. Supp. 597, 615-16 (N.D. Ill. 1987).

explained in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975):

> When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn. Such growth may be quite consistent with the congressional enactment and with the role of the federal judiciary in interpreting it . . . .

Id. at 737 (citation omitted). It does not follow, however, that because the private cause of action under Section 10(b) and Rule 10b-5 is itself an implied cause of action – that is defined by a developing common law of judicial decisions – the federal courts should create a right to contribution to benefit those who violate the statute and rule.

As the Eighth Circuit correctly held in *Chutich*, "[b]ecause federal courts implied the private right of action for substantive violations of section 10(b) and Rule 10b-5, federal courts have discretion to award appropriate relief *to plaintiffs* pursuing that right of action."[12] "It does not follow, however, that federal courts have common law power to create a new right of action for contribution accruing *to defendants*." *Chutich*, 960 F.2d at 724 (emphasis added) (citing *Franklin v. Gwinnett County Public Schools*, ___ U.S. ___, 112 S. Ct. 1028, 1037 (1992), and *Texas Industries*, 451 U.S. at 97).

Lower court decisions creating a right to contribution conflict irreconcilably with this Court's precedents limiting the nature and scope of actions that may judicially be created under Section 10(b) and Rule 10b-5. In *Santa Fe Industries*, 430 U.S. at 477-78, for example, this Court held that the implied cause of action arising under Section 10(b) *may not* be extended to actions that serve a subsidiary purpose of the statute and are not necessary to the fundamental protection of investors, stating that, "[a]lthough we have recognized an implied cause of

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[12] *Chutich*, 960 F.2d at 724 (emphasis added). The implied action under Section 10(b) has been explicitly endorsed as such by Congress. *See supra* note 4.

action [under Section 10(b)] in some circumstances, we have also recognized that *a private cause of action under the antifraud provisions of the Securities Exchange Act should not be implied where it is 'unnecessary to ensure the fulfillment of Congress' purposes' in adopting the Act*." *Id.* at 477 (citations omitted, emphasis added).

One fundamental purpose of the securities laws generally, and of Section 10(b) in particular, is to guarantee full disclosure of information about securities and to prevent fraud. This statutory provision is part of a legislative enactment which was "designed to protect investors against manipulation of stock prices," *Basic*, 485 U.S. at 230, by "implementing a 'philosophy of full disclosure.' " *Santa Fe Industries*, 430 U.S. at 477-78. In addition, under Section 10(b) Congress did not authorize the SEC to prescribe rules or regulations *for the benefit of* those who commit securities fraud.[13] Instead, Congress authorized the SEC to promulgate such rules and regulations as are "necessary or appropriate in the public interest or *for the protection of investors*." 15 U.S.C. § 78j(b) (emphasis added). Thus, the SEC promulgated Rule 10b-5 thereunder *to outlaw fraud*, not to protect those who commit fraud. The Commission has never purported to promulgate any rule that would create a right to contribution to benefit those who commit securities fraud.

Moreover, only a small portion of the statutory provisions imposing express liability under the securities laws create an additional right to contribution for those who are held liable thereunder. *See* Mark J. Loewenstein, *Implied Contribution Under The Federal Securities Laws: A Reassessment*, 1982 Duke L.J. 543, 550. Thus, Judge Renner

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[13] *Cf. King v. Gibbs*, 876 F.2d at 1281 ("[W]e cannot infer from the language of Section 10(b) or Rule 10b-5 a congressional intent to permit indemnification of those who were either alleged to have engaged in the deceptive and manipulative practices or those who have been proven guilty of utilizing such practices.").

has persuasively argued that congressional intent to create a right to contribution under Section 10(b) cannot be implied:

> No argument has been presented that persuades the Court that the defendants in § 10(b) actions constitute persons Congress intended to comprehensively protect when it passed the securities laws. . . . The Court agrees . . . that the fact that Congress provided express rights to contribution for three out of the seven express remedies provided in the securities laws is not persuasive of intent with regard to § 10(b). Defendant contends that the standard for implication of contribution rights is such that no defendants would ever be considered part of a group Congress intended to protect by its legislation. The Court disagrees. If Congress had, for example, enacted express rights of contribution for *all* the express causes of action in the securities laws, a persuasive argument could be made that contribution should also exist for implied causes of action.

Chutich v. Green Tree Acceptance, Inc., 759 F. Supp. 1403, 1407 (D. Minn. 1991) (emphasis in original, citation omitted), *aff'd sub nom. Chutich v. Touche Ross & Co.*, 960 F.2d 721 (8th Cir. 1992); *accord Robin*, 730 F. Supp. at 124. Allocating responsibility among those who commit fraud from full liability for their wrongs is, *at best*, a subsidiary purpose of the securities laws. In *Santa Fe Industries*, this Court held that federal courts are *not* authorized under Section 10(b) to create private causes of action "to serve what is 'at best a subsidiary purpose' of the federal legislation." *Id.* at 478.

Therefore, Congress has not given the courts the power to develop substantive law of contribution under Section 10(b), *see Texas Industries*, 451 U.S. at 640; *Chutich*, 960 F.2d at 724, and nothing in this Court's Section 10(b) jurisprudence permits courts to create a right to contribution thereunder.

C. Creation Of A Right To Contribution Is Contrary To Public Policy Underlying Section 10(b) And Rule 10b-5

Section 10(b) and Rule 10b-5 provide investors with significant protections from fraudulent practices in the securities markets.[14] The statute was expressly intended as "a comprehensive antifraud provision operating even when more specific laws have no application."[15] Although Congress gave the SEC the primary role in enforcing this provision, private suits brought under Section 10(b) constitute "an essential tool for enforcement of the [Exchange] Act's requirements," *Basic*, 485 U.S. at 231, and are " 'a necessary supplement to [SEC] action.' " *Bateman, Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)).

This Court has made it clear that rules facilitating Section 10(b) litigation "support[] the congressional policy embodied in the [Exchange] Act" of combating all forms of securities fraud. *Basic*, 485 U.S. at 245. This Court has also stated that "Congress' aim in enacting the [Exchange] Act was not confined solely to compensating investors;" rather, "Congress intended to *deter fraud and manipulative practices* in the securities markets, and to insure full disclosure of information material to investment decisions." *Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986) (emphasis added, citations omitted); *see also Huddleston*, 459 U.S. at 386-87 (primary policy embodied by

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[14] *See Basic*, 485 U.S. at 230 ("The [Exchange] Act was designed to protect investors against manipulation of stock prices.") (citing S. Rep. No. 792, 73d Cong., 2d Sess. 1-5 (1934)).

[15] *Lampf, Pleva, Lipkind, Prupis & Petigrow*, 111 S. Ct. at 2789 (Kennedy and O'Connor, JJ., dissenting); *see also Herman & MacLean v. Huddleston*, 459 U.S. 375, 386 (1983) (referring to "the broad proscription against fraud in [Section] 10(b)").

Congress in the Exchange Act is the punishment and deterrence of securities violations).

Creation of a right to contribution to benefit those who commit securities fraud prohibited by Section 10(b) and Rule 10b-5 is contrary to public policy underlying the statute and the rule for several reasons described below. Allowing wrongdoers to spread the cost of judgment through an implied cause of action for contribution seriously undermines the Exchange Act's undisputed deterrent purpose. Contribution also runs contrary to the public policy encouraging private enforcement of the securities laws because it discourages and penalizes settlement. The creation of a right to contribution greatly complicates the prosecution of securities fraud actions and it can also be expected to burden the courts by creating second and third generations of litigation, even after the initial case settles or is otherwise resolved. As a consequence of these factors, considerations of equity and judicial economy also greatly weigh against creation of a right to contribution to benefit those who are liable for committing securities fraud.

1. Creation Of A Right To Contribution Lessens Deterrence

Proponents of contribution invariably contend that contribution promotes public policy by enhancing the deterrent effect of the securities laws and several courts have created a right to contribution based on this rationale.[16] They are wrong. Contribution actually acts as "a

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[16] Lower courts that have created an implied right to contribution under Section 10(b) have done so based on the fallacious assumption that contribution furthers public policy because it enhances the deterrent effect of the securities laws and on the misguided notion that considerations of equity and fairness among wrongdoers favor contribution. *See, e.g., Smith v. Mulvaney*, 827 F.2d 558, 561 (9th Cir. 1987). In *Texas Industries* and *Northwest Airlines*, however, this Court held that neither public policy nor equity is

form of liability insurance, because it reduces the variance of the ex post outcomes in joint tortfeasor cases." William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 203 (1987). Like liability insurance, it allows those who commit fraud to spread the costs of liability if they get caught.

The uninformed may think that a rule of no contribution might "lead to underdeterrence, *but it does not*." Richard A. Posner, *Economic Analysis of Law* 172-73 (3d ed. 1986) (emphasis added). Thus, although courts "have uniformly offered deterrence as a rationale for allowing contribution, thoughtful contemporary analysis indicates that a rule denying contribution in rule 10b-5 actions may actually operate as a greater deterrent than a rule permitting contribution." Loewenstein, *Implied Contribution*, 1982 Duke L.J. at 573. Whatever the proponents of contribution may say, responsible economic analysis "clearly refutes the argument that contribution should be favored because it yields more deterrence than no contribution, for the contrary is true." Frank H. Easterbrook, William M. Landes & Richard A. Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J. Law & Econ. 331, 353 (1980).

A "rule of no contribution provides greater deterrence" to wrongdoing than can "any rule of contribution." *Id.* at 332.[17] Moreover, the effect of contribution in

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sufficient to justify the creation of a right to contribution where Congress did not clearly intend to create one. *Texas Industries*, 451 U.S. at 638; *Northwest Airlines*, 451 U.S. at 89-90, 98 n.41.

[17] Several circuit court decisions have acknowledged this point. In *Wilson P. Abraham Constr. Corp. v. Texas Industries, Inc.*, 604 F.2d 897, 903 & n.11 (5th Cir. 1979), *aff'd sub nom. Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), the Fifth Circuit stated that a rule denying contribution "may very well enhance the [antitrust] statutes' deterrent effect by preventing a defendant from cutting its losses." Similarly, in *Baker, Watts*, 876 F.2d at 1105-06, the Fourth Circuit observed that "[a]n even greater deterrent effect may exist if a single securities wrongdoer . . . is held liable for the total adverse judgment." *Compare Olympia Brewing*, 674 F. Supp. at 616

lessening deterrence is greatly compounded by a contribution bar rule federal courts have adopted to implement the purported right when plaintiffs settle with one of several jointly liable defendants. The unfortunate effects of creating an implied right of contribution, in connection with settlement of litigation, are described in the following section.

2. A Judicially Created Cause Of Action For Contribution Discourages Settlement

A judicially created cause of action for contribution is contrary to public policy because it discourages settlement of litigation. In *Texas Industries*, this Court recognized in the antitrust context that "a right to contribution may have a serious impact on the incentive of defendants to settle." 451 U.S. at 637. A rule against contribution encourages settlement and promotes equity because "[t]he competition to settle will *magnify* the relative payment of the more culpable parties." Easterbrook, Landes & Posner, *Contribution*, 23 J. Law & Econ. at 354, 360; *see also id.* at 368-70 (demonstrating this). Thus, *any* rule of contribution this Court might create will make settlement more difficult.

However, its deleterious impact is greatly increased by the way some federal courts have implemented the right to contribution in securities fraud actions. In decisions such as *Franklin v. Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S. Ct. 232 (1990), federal courts have held that if plaintiffs settle with one of several defendants and agree to bar the remaining defendants' right to contribution, the plaintiffs thereby forfeit their right to be made whole when liability is established after trial. These cases hold that if one of

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n.20 ("contemporary analysis exists indicating that a rule denying contribution in section 10(b) cases may provide as great a deterrent to future wrongdoing as a rule permitting contribution") (citing Easterbrook, Landes & Posner, *Contribution*, 23 J. Law & Econ. at 349). No decision that adopts contribution to enhance deterrence can claim to be based on sound economic analysis.

several defendants settles an action so that claims for contribution against it will be barred, plaintiff's eventual judgment against the remaining defendants must be reduced by the settling defendant's proportionate culpability.[18] By creating and then implementing the right to contribution with the "proportionate fault" or *Kaypro* rule these decisions have greatly reduced (and often even eliminated) incentives to settle and have made the prosecution of meritorious cases much more difficult.

The effects of such a rule are important. Typically, in instances of securities fraud, a number of defendants have acted together to perpetrate the fraud.[19] Some of these culpable parties are usually more solvent than others who may

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[18] The Ninth Circuit and various district courts in the Third, Fourth and Tenth Circuits have adopted the proportionate fault setoff method. *See Kaypro*, 884 F.2d at 1231; *In re Granada Partnership Securities Litigation*, [Current Binder] Fed. Sec. L. Rep. (CCH) ¶96,851, at 93,442-43 (S.D. Tex. 1992); *United States Fidelity & Guaranty Co. v. Patriot's Point Development Authority*, 772 F. Supp. 1565, 1571 (D.S.C. 1991); *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540, 552-53 (D. Colo. 1989), *appeal dismissed as moot*, 936 F.2d 582 (10th Cir. 1991); *In re Sunrise Securities Litigation*, 698 F. Supp. 1256, 1261 (E.D. Pa. 1988). Fortunately, the federal courts are *not* unanimous in embracing the *Kaypro* rule. The Second Circuit and district courts in the First, Fifth, Seventh and Eighth Circuits have analyzed and adopted the *pro tanto* offset method. *See, e.g., Singer v. Olympia Brewing Co.*, 878 F.2d 596, 600 (2d Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990); *Biben*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,512, at 92,232-33; *MFS Municipal Income Trust v. American Medical Int'l, Inc.*, 751 F. Supp. 279, 281-86 (D. Mass. 1990); *Dalton v. Alston & Bird*, 741 F. Supp. 157, 159-60 (S.D. Ill. 1990); *In re Terra-Drill Partnerships Securities Litigation*, 726 F. Supp. 655, 656-57 (S.D. Tex. 1989); *see also* Wm. Bruce Davis, Comment, *Multiple Defendant Settlement in 10b-5: Good Faith Contribution Bar*, 40 Hastings L.J. 1253 (1989). Alternative rules are discussed below, in Part II.D of this brief.

[19] *See, e.g., In re American Continental Corp./Lincoln Savings & Loan Securities Litigation*, 794 F. Supp. 1424 (D. Ariz. 1992) (denying defendants' motions for summary judgment in Section

even be bankrupt or have no collectible assets. In addition, plaintiffs occasionally find that their case against a given defendant is not as strong as they reasonably believed when they initially filed suit. For these and other reasons, it often makes good sense for plaintiffs to settle with some defendants in order to prosecute the case through trial against those who remain – and who should be liable to make plaintiffs whole for their entire loss under principles of joint and several liability. Of course, this makes sense for the settling defendants only if the remaining defendants cannot obtain contribution from a settling defendant after they are themselves held liable. Otherwise, a defendant has no incentive to settle.[20]

Unfortunately, much of the applicable case law now holds that if plaintiffs settle with one of several defendants and bar the right to contribution of the remaining defendants they thereby forfeit their right to be made whole when liability is established after trial: the "proportionate fault" or *Kaypro* rule requires the judgment against the remaining defendants to be reduced by the proportionate fault of the defendants who settled.[21] By denying plaintiffs the right to be made whole for their losses, the right to contribution discourages reasonable settlements by making them too costly for plaintiffs to bear.[22] It also

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10(b) class action alleging conspiracy between officers and directors, accountants, attorneys, consultants and investment bankers).

[20] *See Kaypro*, 884 F.2d at 1229; *Miller v. Apartments & Homes of New Jersey, Inc.*, 646 F.2d 101, 109 (3d Cir. 1981); *In re Nucorp Energy Securities Litigation*, 661 F. Supp. 1403, 1408 (S.D. Cal. 1987) ("Anyone foolish enough to settle without barring contribution is courting disaster.").

[21] *See supra* note 18.

[22] Plaintiffs' incentive to settle claims before trial is further reduced because the monetary amount of the proportionate fault set-off is unknown until after trial. Plaintiffs' inability to gauge the effect of settlement on their total recovery is particularly critical in numerous securities fraud class actions because

reduces the exposure of defendants to the extent settlements still occur because settlements can only reduce the overall liability faced by those who practiced fraud.[23]

To illustrate this, one may consider the case of plaintiffs who suffered total damages of $10 million as a consequence of a securities fraud perpetrated by several defendants. If they proceed to trial and obtain judgment against defendants then plaintiffs are entitled, under principles of joint and several liability, to recover their entire loss of $10 million. If there is no right to contribution and they settle with one defendant for $100,000, they will be able to proceed to trial and obtain a favorable judgment for the entire $10 million and their recovery against the trial defendants will then be reduced by the $100,000 obtained in settlement. Thus, plaintiffs recover the entire loss of $10 million, and the purposes of the Section 10(b) to protect investors and deter fraud are given full effect.

If there is a right to contribution, however, under cases like *Kaypro* the amount which defrauded plaintiffs can recover after trial may be greatly reduced. If the individual defendant who settled out for $100,000 is found by the jury to be ten per cent (10%) culpable, the judgment will then be reduced not by the $100,000 actually paid but by ten per cent (10%) or $1 million, and plaintiffs will recover only $9 million from the remaining defendants – for a total recovery of $9.1 million – after a plaintiffs' verdict. If the individual

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the uncertainty inherent in a proportionate fault scheme makes it difficult to frame a notice to the class reflecting the terms of settlement. *See In re Atlantic Financial Management, Inc. Securities Litigation*, 718 F. Supp. 1012, 1018 (D. Mass. 1988). Because the amount of set-off cannot be determined until after trial is conducted with the non-settling defendants, plaintiffs may be unable to advise the class as to whether a proposed pretrial settlement is fair.

[23] *See* Landes & Posner, *The Economic Structure of Tort Law* 203 (noting that a proportionate fault rule "results in lower recoveries").

defendant who settled out for $100,000 is found to be fifty per cent (50%) culpable, then the judgment against the remaining defendants will be reduced by $5 million, and the plaintiffs, who lost $10 million, recover a total of only $5.1 million. Recognition of a right to contribution therefore costs the victims of fraud $4.9 million *and* gives defendants who committed fraud a windfall of $4.9 million in relief from full joint liability for their wrongs. *Recognition of a right to contribution effectively transfers wealth from victims of fraud to those who practiced it upon them.* This frustrates Section 10(b)'s dual purposes of protecting investors and deterring fraud.

The only way for defrauded plaintiffs to avoid such problems is to refuse to settle with one or more of several defendants – even if those defendants who wish to settle are willing to pay everything they own in settlement! If plaintiffs settle with a defendant, they can expect those who remain in the case to point to that person as the ringleader in order to convince the jury that he, she, or it was ninety per cent (90%) culpable – solely to correspondingly reduce their own liability to the injured investors. This puts plaintiffs in the position of *defending* the conduct of persons they had sued, but settled with, thereby greatly complicating effective trial prosecution.

To the extent settlements still *can* be achieved, recognition of contribution with the *Kaypro* rule will greatly reduce the deterrent effect of the securities laws because the right to be made whole is lost, and the ultimate recovery is likely to be reduced greatly whenever plaintiffs settle and agree to bar contribution against the settling defendants. This is, of course, absolutely contrary to the powerful public policy that favors effective private enforcement of Section 10(b) and Rule 10b-5.

3. Creation Of A Right To Contribution Would Place Unnecessary Burdens On Litigants And The Courts

Another consideration weighing against judicial creation of a right to contribution is the burdensome effects

the implied right would have on prosecution of meritorious litigation, and on the courts. "Anyone who thinks that contribution is procedurally straightforward will be disabused of this notion by dipping into the legal literature."[24] In the words of this Court, "[d]ividing or apportioning damages among a cluster of co-conspirators presents difficult issues, for the participation of each in the conspiracy may have varied." *Texas Industries*, 451 U.S. at 637. "Regardless of the particular rule adopted for allocating damages or enforcing settlements, the complexity of the issues involved may result in additional trial and pretrial proceedings, thus adding new complications to what already is complex litigation." *Id.* at 638.

Considerations of simplicity and judicial economy weigh heavily against creation of new rights to contribution. There is no question that a regime which provides for contribution "is more costly to administer than no contribution, because it requires the courts to decide another issue and supervise another set of transfer payments." Posner, *Economic Analysis of Law* at 173. Further, a no-contribution rule economizes on administrative costs, compared to contribution, because there is no subsequent action "between injurers to determine how the burden of the tort judgment should be shared in the event deterrence breaks down and [a violation] occurs." Richard A. Posner, *Tort Law: Cases and Economic Analysis* 621 (1982).

We have seen that some federal courts define and implement the right to contribution in a fashion that requires the *relative culpability* of all defendants, both those who are on trial *and those who have settled out of the case*, to be adjudicated.

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[24] William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 201 n.13 (citing John G. Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle Association v. Superior Court*, 30 Hastings L.J. 1464, 1485-1514 (1979); Stuart M. Gordon & Diane R. Crowley, *Indemnity Issues in Settlement of Multi-Party Actions in Comparative Negligence Jurisdictions*, 48 Ins. Counsel J. 457 (1981)).

See supra Part II.C.2. Obviously, this practice makes the trial of securities fraud litigation far more difficult than it needs to be with respect to the burden on both litigants and on judicial resources. Further, it removes all benefits that partial settlement of a case might have in simplifying trial of the matter.

In addition, contribution can cause further problems even if plaintiffs settle with *all* of the defendants named in an action, *as happened in this case*. Claims for contribution asserted in the courts below have spawned a second generation of litigation after the initial action for securities fraud was *completely settled* by the parties to it. The Ninth Circuit's recognition of a right to contribution in this case has spawned years of satellite litigation with appeals all the way to this Court. If this Court holds that there *is* a right to contribution, and the defendants in this case are required to pay, they could themselves file yet another action: a third generation of litigation seeking to hold still others accountable for contribution to *them*!

While it will burden the courts, none of this surplus litigation does anything to advance the purposes underlying Section 10(b) and Rule 10b-5. A rule that permits contribution in any form "entails costly suits among injurers attempting to shift part of the victim's loss away from the defendant(s) on whom the victim levied judgment – suits with ex post distributive consequences but no impact on incentives for efficient accident [or fraud] avoidance." Landes & Posner, *The Economic Structure of Tort Law* 201-02.

4. Creation Of A Right Of Contribution To Benefit Wrongdoers Is Contrary To Fundamental Principles Of Equity And Fairness

Creating a right to contribution on behalf of those who committed fraud is *fundamentally unfair* to their victims, who are forced to bear the extra burdens of proving a case in which rights to contribution will also be tried. It is *fundamentally unfair* to victims who can settle claims

against one of several defendants only by forfeiting the right to be made whole.

After careful consideration of all the arguments for, and against, implication of a cause of action for contribution under Section 10(b), Professor Loewenstein concluded that "it may be unfair to permit a rule 10b-5 defendant to seek contribution." Loewenstein, *Implied Contribution*, 1982 Duke L.J. at 558. He explained:

> The contribution aspects of a case might substantially complicate an already complicated securities fraud case. The original defendant would have to implead third-party defendants and prove their culpability, thus delaying the plaintiff's case or causing confusion among the members of the jury. If the court decides to adopt a rule of comparative culpability in determining the portion of the judgment each defendant must contribute, further complexity is added and the cost of administering the securities laws increases. It may indeed be fairer to let the plaintiff control the litigation and choose the defendants while denying the guilty defendants the right to seek contribution.

Id. at 558-59.

Fairness considerations weigh against implication of a right to contribution where the underlying liability is based on a finding of scienter, as it is under Section 10(b) and Rule 10b-5. *See* Easterbrook, Landes & Posner, *Contribution*, 23 J. Law & Econ. at 341. As Professor Loewenstein explains:

> The Supreme Court has held that *scienter* is required to establish liability under Section 10(b). That is, the defendant must have acted with an intent to defraud. Because common law courts have traditionally been unwilling to provide a right to contribution when the defendant seeking contribution committed an intentional tort or acted recklessly, the federal courts should be reluctant to find a right to contribution under Rule 10b-5 . . . .

1982 Duke L.J. at 551-52. Thus, "the nature of a rule 10b-5 action, requiring as it does proof that the defendant acted with *scienter*, suggests that it is not unfair to deny contribution in such actions." *Id.* at 573. *Accord Professional Financial Management*, 683 F. Supp. at 1287 ("Because scienter is required for liability under Rule 10b-5, it is also not unfair to deny contribution in such actions.").

In *Texas Industries*, Professor Loewenstein observes, this Court reiterated "the traditional reason for denying contribution among intentional tortfeasors: 'traditional equitable standards have something to say about the septic state of the hands of such a suitor in the courts, and, in the context of one wrong doer suing a co-conspirator, these standards similarly suggest that parties generally *in pari delicto* should be left where they are found.' " Loewenstein, *Implied Contribution*, 1982 Duke L.J. at 558 n.84 (quoting *Texas Industries*, 451 U.S. at 635); *compare Pinter v. Dahl*, 486 U.S. 622, 632-35 (1988) (applying *in pari delicto* principle to securities fraud claims).

Denying contribution to wrongdoers who act with scienter is by no means unfair. Anyone who wishes to avoid liability can easily do so by choosing not to commit securities fraud. Those who choose to risk liability by committing violations of Section 10(b) and Rule 10b-5 have no claim to equitable consideration that might counterbalance the inherent unfairness *to their victims* of creating a judicially implied right of contribution.

Thus, while considerations of equity cannot justify judicial *creation* of a right to contribution, *see Texas Industries*, 451 U.S. at 638; *Northwest Airlines*, 451 U.S. at 89-90, 98 n.41, they should be sufficient to *defeat* creation of a cause of action for contribution under Section 10(b) and Rule 10b-5 because a central purpose of the statute and rule is to protect investors from fraud. If creation of an implied right is unfair to the victims of securities fraud perpetrated in violation of Section 10(b) and Rule 10b-5, it runs counter to the very purpose of the statute and rule. Judicial creation of such a right is improper.

D. If This Court Creates A Right To Contribution Under Section 10(b) It Should Define The Right In A Way That Minimizes Its Deleterious Effects

If this Court creates a right to contribution, it should define that right in a way that at least minimizes its deleterious effects. This Court should expressly repudiate the *Kaypro* rule which, as we have shown, impairs settlement, complicates litigation, prevents victims of fraud from being made whole, and reduces the deterrent effect of the securities laws. This Court should *not* create a right to contribution without giving lower courts and litigants some indication of just *what* that right to contribution *is*.

By definition contribution governs the allocation of liability among multiple defendants. Thus, in creating a right to contribution, this Court should explain *how* that liability is to be allocated. It could be allocated *pro rata* so that liability is divided equally among all those who perpetrated the fraud. It could be allocated based either on pretrial or post trial findings of relative fault, or it could be allocated based on the *pro tanto* rule. When a defendant settles and bars claims for contribution this could result in a *pro rata*, *pro tanto*, or proportionate reduction in the damages that may be collected from the remaining defendants.[25]

The *pro tanto* rule is clearly preferable in light of the Congressional policy inherent in Section 10(b) that fraud should be deterred and its victims made whole. In *Miller* the Third Circuit recognized that:

> [The] law generally seeks to assure the tort victim neither more nor less than one complete satisfaction of his claim. A rule of *pro tanto*

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[25] *See, e.g., In re Jiffy Lube Securities Litigation*, 927 F.2d 155, 161 n.3 (4th Cir. 1991) (describing the three methods); *Miller*, 646 F.2d at 109 (comparing *pro rata* and *pro tanto* methods); *Terra-Drill*, 726 F. Supp. at 656-57 (comparing the three methods); *Atlantic Financial*, 718 F. Supp. at 1017-18 (comparing *pro tanto* and proportionate methods).

> reduction accomplishes this goal. A rule of *pro rata* reduction frustrates it to the extent that the plaintiff makes a good or a bad settlement.

Miller, 646 F.2d at 109.

Courts in the First, Second, Fifth, Seventh and Eighth Circuits have expressly rejected the *Kaypro* rule and adopted the *pro tanto* offset method because it is clearly superior. *See, e.g., Singer*, 878 F.2d at 600; *Biben*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,512, at 92,332-33; *FDIC v. Geldermann, Inc.*, 763 F. Supp. 524, 528-32 (W.D. Okla. 1990); *MFS Municipal Income Trust*, 751 F. Supp. at 281-86; *Dalton*, 741 F. Supp. at 159-60; *Terra-Drill*, 726 F. Supp. 656-57; *Atlantic Financial*, 718 F. Supp. at 1017-18; *see also* Davis, *Multiple Defendant Settlement*, 40 Hastings L.J. at 1272 (suggesting that a *pro tanto* rule "would produce more equitable settlements").

We have shown the *Kaypro* proportionate fault rule adds complexity to already complex securities fraud jury trials, requiring the jury to make subtle determinations regarding the fault of an absent non-party and compelling plaintiffs' counsel to defend a person or entity they believed defrauded them if the victims of the scheme are to maximize their recovery. Under the *pro tanto* rule, contribution does not inhibit settlement to the extent that it does under the *Kaypro* rule because the *pro tanto* offset allows plaintiffs to be made whole. Moreover, under the *pro tanto* rule the uncertainty inherent in the proportionate fault rule is not present because the non-settling defendant is entitled to a set-off equal to the dollar amount of the settlement with the settling defendants.

Of course, even the *pro tanto* rule has its deficiencies.[26] Although the *pro tanto* rule is clearly preferable to

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[26] It requires the trial court to make a finding that a partial settlement has been made in good faith and is appropriate under the circumstances. The fundamental concern at the good faith hearing is that the settlement is fair to the non-settling defendant because he, she, or it is giving up purportedly valuable contribution rights. Such a finding may require a court to review potential liability and damages at a time when such evidence may not be sufficiently developed through discovery. *See Jiffy Lube*, 927 F.2d at 159; *Kaypro*, 884 F.2d at 1230; *Biben*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,512, at 92,333; *Atlantic Financial*, 718 F. Supp. at 1017; *Patriot's Point*, 772 F. Supp. at 1574.

the *Kaypro* rule of proportionate fault because it does not inhibit settlement to such a crippling degree, and because it does not reduce deterrence as much, *neither rule* furthers the purposes of Section 10(b) and Rule 10b-5. A holding that rejects contribution altogether is far superior to *any* contribution rule.

III. CONCLUSION

Creation of a judicially implied cause of action for contribution under Section 10(b) and Rule 10b-5 is impermissible under this Court's decisions in *Northwest Airlines* and *Texas Industries*. Moreover, permitting contribution in this setting is contrary to the public policy of Section 10(b) because it reduces deterrence, discourages settlement and, in many Circuits, prevents victims of fraud from being made whole. In addition, it greatly increases the expense and burden of litigation both for litigants and courts.

When addressing public policy concerns raised by a claimed right to contribution under the antitrust laws, this Court stated:

> In declining to provide a right to contribution, we neither reject the validity of those arguments nor adopt the views of those opposing contribution. Rather, we recognize that, *regardless of the merits of the conflicting arguments, this is a matter for Congress, not the courts, to resolve.*

Texas Industries, 451 U.S. at 646 (emphasis added). Thus, this Court recognized:

> The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts.

Id. at 647 (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980)).

As this Court stated last Term, unlike the discretion to award appropriate relief, the authority to fashion a new cause of action for contribution expands the federal judicial power "into a sphere properly reserved to the Executive and Legislative Branches." *Franklin*, 112 S. Ct. at 1037; *see also Northwest Airlines*, 451 U.S. at 97; *Chutich*, 960 F.2d at 724. Thus, this Court should reverse the Ninth Circuit's decision recognizing an implied cause of action for contribution under Section 10(b) and Rule 10b-5.

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Respectfully submitted,

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